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PAGING NETWORK, INC.
CC Docket No. 96-128 - Comments
July 1, 1996

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
Implementation of the Pay)
Telephone Reclassification and)
Compensation Provisions of the)
Telecommunications Act of 1996)

CC Docket No. 96-128

COMMENTS OF PAGING NETWORK, INC.

PAGING NETWORK, INC.

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Summary

Section 276(b)(1) of the Telecommunications Act of 1996 seeks to promote the widespread deployment of payphones to ensure the availability of services to the general public, and to promote competition generally. However, in implementing the mandates of that section, the Commission is faced with a myriad of difficult challenges. It must balance the interests of all affected parties, ensuring that any plan designed to assure "fair compensation" to payphone providers, at the same time, be fair to other parties, such as providers of and subscribers to 800 services.

PageNet has considered many compensation options. PageNet believes that either the costs for payphone compensation must be shared among all users of interexchange services by, for example, recovery through the subscriber line charge, or charged by the payphone provider to the caller on a coin-sent paid basis. Nothing precludes the Commission from adopting either of these options.

PageNet believes that the first option could be effected by requiring the LECs to bill an additional amount to the subscriber line charge presently assessed all end-users. This is a fair and effective way of passing the costs to all potential users of interexchange services, since the public generally benefits from the ubiquity of 800 numbers to place toll-free telephone calls.

(If the Commission chose, it could be limited to all business users.)

The second alternative, and one which PageNet believes more directly addresses the principle of cost-causation, would give payphone providers the ability to charge a range of rates to the end-users who actually place access code, 800, and other calls. The Commission has broad authority under the Communications Act, as amended, to adopt this coin-based set-use fee approach. PageNet believes that this mechanism imposes the payment obligation, more directly, on the proper party. Indeed, the Commission has previously found that charging the end-users who originate calls from pay telephones is the "ideal solution" to payphone cost recovery.

PageNet submits that one clearly inappropriate and unlawful method for compensating the payphone providers would be to, in any manner, directly or indirectly, charge only the 800 subscribers. 800 subscribers have chosen to pay for transport for incoming calls. These subscribers have not chosen to pay for the premises equipment used by callers. Such a requirement would be unreasonably discriminatory under the Communications Act and also change radically the viability of services which use 800 as an access means or component of the service.

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TO: The Commission

COMMENTS OF PAGING NETWORK, INC.

Paging Network, Inc. ("PageNet"), by and through its undersigned counsel, hereby submits its comments in response to the Federal Communications Commission's (the "Commission") Notice of Proposed Rulemaking in CC Docket No. 96-128¹ to implement the mandates of the Telecommunications Act of 1996² as they relate to pay telephones. As set forth below, PageNet believes that the only just and reasonable means of allowing pay telephone providers compensation for use of their payphones are to include

¹ In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, FCC 96-254 (rel. June 6, 1996) ("Payphone NPRM").

² Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. § 276) (the "1996 Act").

payphone compensation in the carrier common line component of the subscriber line charge, or to permit payphone providers to charge a coin paid, set-use fee.

I. INTRODUCTION

A. Statement of Interest

Paging Network, Inc. ("PageNet") is the largest paging carrier in the United States. Established in 1982, PageNet currently provides service to approximately 7.4 million mobile units throughout the United States. PageNet offers service in every major market and is in the process of building systems pursuant to its nationwide narrowband personal communications services authorizations. As a key component of its nationwide messaging service package, PageNet subscribes to 800 toll-free numbers for the benefit and convenience of its subscribers. Through the use of these 800 numbers, PageNet offers the ability for callers to send messages to its paging subscribers toll-free. PageNet's paging subscribers are charged on a flat rate, monthly basis, with no separate usage or toll charges. As an 800 number subscriber, PageNet is critically interested in the instant proceeding.

**B. Implementation Of The Mandates Of
The Telecommunications Act Of 1996**

In this proceeding, the Commission is tasked with the unenviable responsibility of addressing very complex technical, economic, legal and public policy issues. Four years ago, after

grappling with similar issues in the context of dial-around traffic from pay telephones, the Commission came up with a payphone compensation mechanism which, while not perfect, the Commission believed reasonably satisfied the conflicting interests of payphone providers, interexchange carriers, operator service providers, the incumbent local exchange providers, and other interested parties. The 1996 Act now directs the Commission to re-examine its payphone compensation policy to, among other things, establish a per-call compensation plan to ensure fair compensation for all payphone service providers.

The plan which the FCC derived for dial-around compensation for interexchange carriers does not work in the context of 800 subscriber calls, such as at issue here. Users of 800 services, like PageNet, are not responsible for the costs of the payphones which are used to originate calls, whether or not such phones are considered subscriber equipment. It is the calling party in each instance who is responsible for the call placement, and thus it is the calling party in each instance who is responsible for call payment. As set forth below, the payphone providers may recover this amount directly from the calling party, or the costs may be spread across all users (e.g. potential calling parties) through an apportionment of the carrier common line collected from the end user line charge. This could be limited to the end user line charge to business if the Commission determined that limitation appropriate.

In no circumstance would it be reasonable to charge the called party.³

II. ARGUMENTS

A. All Users Of Telephone Service Should Be Assessed For Pay Telephone Compensation

1. 800 Service Availability Benefits The General Public

The proliferation of 800 services has resulted from their substantial benefit to the general public. This is perhaps most evident from the number and the type of subscribers who can be accessed via 1 800. There were over 6,987,063 800 numbers in use as of December, 1995, with millions more toll free numbers in reserve and/or to be available for use as of March 1996.⁴

800 subscribers use their numbers for ease of access. In the paging context, a paging customer subscribes to PageNet's nationwide paging service which offers 800 access to the paging service so that callers can reach the paging subscriber. It in effect offers paging subscribers a form of "reverse roaming" and

³ The called party has not requested the call be placed from a payphone, has no ability to get a rate quote, be informed of the identity of the calling party or the payphone provider, or even to reject the call. Thus, all of the notice and other provisions the Telephone Operator Consumer Services Improvement Act ("TOCSIA") requires in the OSP context would be ignored in the context of 800 subscriber calls, and the services which underlie them.

⁴ Trends in Telephone Service, Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, 1996 FCC LEXIS 2570 (1996).

"reverse toll billing," whereby the paging subscriber can always receive the call regardless of the location nationwide.⁵ Other 800 users also subscribe to these services in order to assure callers that they can reach a central location without toll charges.

There is a significant diversity in the actual identity of 800 subscribers, but clearly many 800 subscribers are federal, state and local governmental agencies as well as both public and private public service "hot lines". A sampling of the governmental agencies that use 1-800 include the FCC (Consumer Assistance Office); the Social Security Administration (e.g., all Metropolitan Virginia Maryland assistance offices access through 800); the Immigration and Naturalization Service (e.g., General Information relating to Legalization); the Internal Revenue Service (e.g., Federal Tax Forms; Federal Tax Information and Assistance); the Interior Department (Employment Office), the Labor Department, The Peace Corps (General Information); the Small Business Administration (Answer Desk), and the Office of Veterans Affairs.

Other key subscribers are those offering information dissemination and assistance services, including the AIDS Hotline

⁵ With plain old POTS numbers, the paging subscriber becomes unreachable by persons seeking to call him or her if out of the local calling range of the local telephone number.

and AIDS Information Clearing House, and the National Domestic Violence Hotline. These are in addition to the millions of businesses and individuals that use 1-800 access; one source in fact claims that "consumers no longer view toll-free numbers as a bonus, but as a necessity."⁶

Callers to these services are equally ubiquitous. There is evidence to suggest that "nine out of ten Americans say that they use toll free numbers and more than a third estimate that they dial 1-800 more than 60 times a year."⁷ Based on the diversity of companies, governmental agencies, private agencies, hot lines, and individuals that use 800 services, it would appear that every adult in the United States potentially benefits from the availability of these services, and equally so through having such services available to them through payphones.

2. Any Charges Assessed For Payphone Compensation Must Be Spread Across All Telephone Users As Part Of The Carrier Common Line Charge

[NPRM, ¶¶ 15-28] The NPRM discusses various alternatives for billing the interexchange carrier who handled payphone traffic, none of which PageNet submits are just and reasonable in the context of paging carriers using 1-800 numbers, or in the context of other services which can be accessed from payphones via 1-800,

⁶ S. Cook. *Public Communications Magazine*, May, 1996 at 18.

⁷ Id.

if subsequently passed through directly or indirectly to the 800 subscriber. Rather, the costs of the payphones should be passed through in some manner to all persons or, at a minimum, all potential users of toll services, as all persons benefit from the opportunity to place toll-free calls from payphones.

The Commission could effect this result by requiring an additional amount be directly added to the subscriber line charge presently assessed to all end users. This would spread the costs of the payphone over all of the people who have the opportunity to place toll free calls from payphones.

While the cost causation recovery principles are not satisfied as directly as requiring the calling party to place coins in the box, these methods nonetheless are consistent with the principles of cost causation to the same degree that the access regime and subscriber line surcharges are today.

It is clear that assessing the costs directly on the 800 provider who may, in turn, attempt to pass such charges directly to the 800 subscriber would have very significant adverse impact. For example, paging carriers who subscribe to 1-800 as an access means would have no opportunity to pass the costs on to the cost causer, the calling party.

Furthermore, neither PageNet nor other providers of similar services have any way of knowing the degree to which callers placing 800 toll-free calls numbers use payphones, but given the

thin margins of the paging business, any further uncompensable costs would have a potentially very detrimental impact. It is also clear that charging governmental, public interest and other 800 subscribers would have an unanticipated financial impact on those subscribers. Clearly, for example, some amount of calls placed to the Department of Immigration for Legalization information are placed from payphones -- that one group's bills alone could be startling if the payphone charges are passed through to the called party, in this instance, the United States Government.⁸

In the context of paging services, directly or indirectly charging the 800-subscriber (e.g., PageNet) or the subscriber to the paging service which incorporates 1-800 calling, would be an unjust and unreasonable practice under Section 201(b). The paging company makes the 1-800 number available to its subscribers for use by others to call the paging subscriber. In no context is the offering of the toll-free service as part of the paging service an offer to pay for the customer premises equipment or the equipment offered on the customer's (in this context the payphone provider's) side of the network demarcation point. Nor is there any other circumstance in which this

⁸ Of course, the impact is all the more unreasonable under Section 201(b) of the Act because the called party has not volunteered, offered, or in any way indicated a willingness to pay such charges.

presently occurs. Businesses, residences, hotels, hospitals and all of the other myriad of places from which pages are placed pay for their own customer equipment. These premises may charge the calling party for use of the equipment. They do not charge the called party. Furthermore, unlike with calling card services where the user placing the call and paying the bill for the call are one and the same, that is not true with paging and other messaging services.⁹ The paging subscriber, by virtue of having the paging number, is essentially subscribing to a device which allows people to call him, via a toll-free number. Subscribers who use 800 numbers have made the decision that they want to offer people who wish to reach them a toll-free access means, for which the paging subscriber pays a flat monthly charge. They have not made the decision to pay for the payphone equipment from which callers may choose to call them any more than they have made the decision to pay for the calling party's home or business or cellular phone when the call is placed from those locations.

⁹ Even with collect calls, the person paying the bill is given the opportunity to accept or reject the charge prior to its being assessed, even where such call is placed by the presubscribed OSP. In the paging context, charging other than the person who places the call from a payphone would directly or indirectly result in charges for payphone use to the paging subscriber which he or she had no opportunity to decline. This sort of forced payment of charges could unreasonably, and unlawfully change the whole dynamic of paging services incorporating 800 availability.

**B. Any Attempt To Require 800 Subscribers To
Pay The Costs Of Call Origination From
Payphones Would Interfere With Existing Contracts**

Any compensation mechanism that imposes the fee for the use of the payphone upon 1-800 or paging carrier subscribers would interfere with millions of existing contracts between these subscribers and either the paging company or IXC. Typically, a paging carrier subscriber contracts with that carrier for use of the pager. The contract may generally be for a fixed time period at a fixed rate. The subscriber to 800 services, e.g. the paging carrier, also contracts with the underlying 800 carrier for those services.

The Commission has never required paging carriers to compensate payphone providers for calls initiated through their payphones to reach a paging subscriber. Thus, paging carriers have not included payphone costs in assessing service charges and, in fact, paging subscriber contracts do not contemplate payment of payphone compensation. Many of these contracts are fixed, long-term contracts.

The imposition of payphone compensation obligations upon paging carriers would require these carriers to pass on the costs (as they should) to their subscribers. Given the millions of paging subscribers that now exist, each with their respective contracts, it would be an administrative nightmare to restructure and renegotiate these contracts, assuming they are even subject to renegotiation. At worst, if the contracts are not subject to

modification, the paging carrier would have to absorb the costs for the duration of the contracts.

Finally, as noted, there is no public policy that supports shifting the burden of payment from the calling party who selects the payphone to the 800 subscriber in this instance.

**C. Alternatively, The Commission Should Adopt
A Set-Use Fee Paid For By The Calling Party**

**1. A Coin-Based Set-Use Fee Approach Is
Consistent With The Commission's Long-
Standing Policy Of Cost-Causation**

[NPRM ¶¶ 15-28] The policy of cost-causation generally allocates costs based upon the principle that costs should be borne by those who cause them. In the payphone context, it is the calling party who uses the payphone -- not the 800 provider -- who causes the costs to be incurred.¹⁰ It is the user of the payphone who makes the choice to use a payphone to place a call to a paging subscriber.¹¹ Neither the IXC providing the 800 service nor the

¹⁰ Consumers already are accustomed to putting a coin in the coin box to place a local call. Hence, requiring them to do the same to place a 1-800 call is not significantly different, particularly in light of the fact that callers already put coins in the box for 80 to 90 percent of the calls that are placed. See The Emerging Independent Payphone Industry: An Investment Update (Oct. 27, 1994) (90 percent of calls are local in nature).

¹¹ In this regard, a "carrier-pays" mechanism described by the Commission (see NPRM at 14-16), will not further competition at the payphone level because it does not provide incentive for the person who has the ability to choose the lowest-cost

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subscriber to the 800 service has control over the location from which these calls are placed. It therefore makes sense that it is the user of the payphone who should pay for the convenience of utilizing the services provided by a payphone provider of a desired location. Indeed, the concept that the person utilizing a service should pay for that use is not novel, but rather holds true in almost all other situations, including situations involving aggregators of telecommunications services.¹² For example, the guest in a hotel pays the aggregator a surcharge for any calls placed from that room, including access-code and toll-free calls. In another context, the person purchasing facsimile services pays not only the costs of transmission over telecommunications lines, but pays the facsimile owner a fee for use. Thus, it is clear that an appropriate payphone compensation mechanism, and one the Commission should adopt, requires that the person originating the call, and causing the costs, compensate the payphone owner accordingly, either discretely as in the

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service (assuming that a coin-based set-use fee mechanism includes a range of rates).

¹² PageNet can think of no other circumstance where the called party would be required to pay for the premises equipment or local transport of the calling party. The cost causation/cost recovery principles simply have never worked that way. Requiring 800 subscribers to pay for these costs when no other subscribers are required to pay such costs would unfairly discriminate against these 800 subscribers in violation of Section 202(a) of the Communications Act.

payment by coin in the box, or indirectly through the end user subscriber line charge discussed above.

An additional benefit of the Commission's adoption of a mechanism that requires the calling parties, the cost-causers, to pay the fee, is that this type of compensation mechanism furthers competition by allocating the costs to those utilizing the service. Assuming that the payphone provider can lower its fee rather than have a fixed per phone federal or state requirement, there is incentive to price such fees competitively because the person with the ability to choose the lowest-cost service -- i.e., the user of the payphone -- is the person paying the fee. In other words, if the IXC or 800 subscriber paid the payphone compensation fee, the calling party would have no incentive to price shop since it is not the calling party who is paying. In this manner, the setting and charging of fees by the payphone owner for use of its phone (as compared to a "carrier-pays" mechanism) is the most competitively efficient mechanism for payphone compensation.

**D. A Coin-Paid Set-Use Fee Is The Only Proposed
Compensation Methodology That Directly Imposes
The Payment Obligation On The Proper Party**

As an alternative to the subscription line charge, the Commission should articulate a national policy which allows payphone providers to charge the calling party for use of their payphones on a coin sent-paid basis. As PageNet sees it, a payphone provider would select a rate (or the FCC would impose a

cap under which the payphone provider's rate would not be deemed unreasonable), and the payphone provider would charge that rate for each completed call.

PageNet believes a coin paid set-use fee to be the most appropriate means of giving payphone providers the opportunity to derive compensation from calls placed from their payphones. Indeed, in PageNet's view, it is the only method which directly, appropriately places the payment obligation upon the person who chose to incur the costs.

E. A Coin-Based Set-Use Fee Will Help Deter Fraud

If the Commission determines that it is the IXC of the underlying 800 service or the 800 subscriber, rather than the calling party, who pays per-call compensation to the payphone provider, there is nothing to prevent the payphone provider from engaging in fraudulent activities. For example, unscrupulous payphone providers could attach an auto dialer¹³ to their payphones in order to place multiple 1-800 calls for the purpose of increasing their revenues. This practice could result in significant loss to toll providers or 1-800 subscribers and would unjustly enrich unscrupulous providers. In the past, the Commission has adopted mechanisms in its regulations that meet

¹³ An auto dialer is equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number-generator and to dial such numbers. 47 U.S.C. § 164.1200(f)(1).

both the goals of the regulations as well as the goal of eliminating incentives to commit fraud.¹⁴ A coin-based set-use fee approach fully satisfies both of these objectives in the context of payphone compensation.

**F. A Coin-Based Set-Use Fee Mechanism
Is Consistent With The Act**

**1. The Commission May Permit The Collection Of A
Coin-Based Set-Use Fee By The Payphone Provider**

Section 226 of the Communications Act of 1934, as amended by TOCSIA ("Communications Act"),¹⁵ directs the Commission to

consider the need to prescribe compensation (other than advance payment by consumers) for owners of competitive public pay telephones for calls routed to providers of operator services that are other than the presubscribed provider of operator services for such telephones.¹⁶

Clearly, the statute does not obligate the Commission to prohibit the collection of advance payment by payphone owners.¹⁷ Indeed, the Commission has concluded that payphone owners could

¹⁴ See, e.g., Proposed Rules, 47 C.F.R. Part 76, Cable TV Act of 1992 Part VI, 58 F.R. 46737, 46739 (1993).

¹⁵ 47 U.S.C. § 226).

¹⁶ 47 U.S.C. § 226(e)(2).

¹⁷ While it is not entirely clear from the statute whether a coin deposited by a consumer for the purpose of either initiating a debit card call or reaching a paging provider's toll-free number to send a message to a paging subscriber can be appropriately classified as an "advance payment," we

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charge callers a flat fee for all access code calls that would be similar to the charge for local calls, provided that the same charge applied to presubscribed calls and was otherwise consistent with federal and state law.¹⁸

PageNet believes that the fee could be determined by the payphone owner or set (at a fixed rate or within a range of rates) by the federal and state authorities.

**2. A Coin-Based Set-Use Fee Mechanism Is
Consistent With The Communications Act**

If the Commission determines, pursuant to the requirements of the 1996 Act, to adopt a coin-based set-use fee as a compensation mechanism, it may establish a range of rates (i.e., a rate cap) or rate guidelines within which compensation assessed by payphone providers must generally fall. The adoption of a rate cap or guidelines is consistent with the Communications Act and does not violate the proscription contained in Section 226(e)(2) against proscription by the Commission of an advance payment. The Commission has found that the establishment of a rate cap, without more, does not constitute a "prescription"

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assume, for purposes of this discussion only, that it is an "advance payment."

¹⁸ In the Matter of Policies and Rules Concerning Operator Services Access and Pay Telephone Compensation, Notice of Proposed Rulemaking, CC Docket No. 91-35, 6 FCC Rcd 1448, 1450 (1991).

within the meaning of Section 205 of the Communications Act.¹⁹

Since payphone providers may assess any payphone compensation rate they choose, guided only by the range of rates guidelines set by the Commission, Section 226(e)(2) is not contravened or otherwise violated.

[NPRM ¶¶ 15-28] It would not be appropriate to set the amount of compensation to the payphone providers based on the dial-around amounts already approved by the Commission for access to operator services. The three approaches upon which the Commission based its per-phone compensation amount in the context of dial-around services were (a) compensation based on the access charge compensation that a IEC receives for its regulated provision of payphones, (b) compensation based on some measure of value to operator services providers of receiving access code calls, and (c) compensation to the payphone provider based on AT&T's

¹⁹ See, e.g., In the Matter of Policy and Rules Concerning Rates for Dominant Carriers, Further Notice of Proposed Rulemaking, CC Docket No. 87-313, 3 FCC Rcd 3195, 1988 FCC LEXIS 1110 (1988) (holding that establishment of a general suspension zone for above-cap and above-band filings does not "proclaim that a certain situation . . . is unlawful and shall not occur," and therefore does not constitute a prescription). *See also* *Nader v. F.C.C.*, 520 F.2d 182, 199 (whether agency has prescribed depends upon impact of action rather than form); *Direct Marketing Ass'n v. F.C.C.*, 772 F.2d 966, 971 (D.C. Cir. 1985) ("In practice, an agency statement has not been found to be a prescription absent explicit language that nonconforming tariffs will be rejected, combined with an agency motive to avoid public scrutiny and perhaps even judicial review.").

commissions deemed to be the value of those calls to AT&T.²⁰

Only the first approach has any merit as a basis for compensation in the context of 800 subscriber services.

The amount recovered in the access regime, e.g., approximately \$6.00 per phone per month for interstate calls, is one possible appropriate measure. The Commission found that the \$6.00 recovered the LEC's costs of payphone provisioning which were not recovered from local coin calls. While that \$6.00 was originally spread over a subset of calls that were not placed over the presubscribed carrier, that same amount now needs to be recovered by all completed interstate and intrastate calls. Thus, one could add the intrastate recovery element to the \$6.00, then divide that amount by the total average number of compensable calls per payphone in order to derive an appropriate per call rate.

Clearly, the second and third approaches are inappropriate measures by which to determine the amount a payphone provider should be paid for the payphone providers' network.

With respect to the second approach, the Commission concluded that one potential measure of value to OSPs of receiving access code calls can be found in LEC 0- transfer service charges. The Commission noted that, insofar as 0-

²⁰ See *id.*

transfer service enables OSPs to receive operator-assisted calls when that OSP is requested by the caller, this service is analogous in many respects to the service provided by payphone providers in originating access code calls to operator service providers.

With respect to the third approach identified above, after making some adjustments, the Commission concluded that the average AT&T commission payment on access code calls to operator service providers would range from about \$.30 per call to about \$.46 per call which, according to the Commission, therefore can be equated for the fair value of the service provided by payphone providers when they originate a particular interstate call to an operator service provider.

Neither the second or third rationales have any basis in the context of 800-subscriber services, such as those that underlie PageNet's nationwide messaging, voicemail, and other services.

First, the Commission chose the LEC 0- transfer charge as a surrogate based on the premise that the 0- transfer charge was what OSPs were willing to pay to receive operator-assisted calls when that OSP is requested by the caller. This premise is inapplicable in the context of paging carriers. The services provided through 1-800 access in the messaging context are totally different than the services provided in the context of

operator services and, thus, the value to 800 subscribers for the ability to receive calls is also different.

Finally, the premise underlying the Commission's third approach, *i.e.*, compensation based on commissions, is also inapplicable in the context of paging carrier 800 subscribers. Unlike presubscribed operator service providers, paging carriers do not pay commissions to payphone providers on completed 0+ calls. Hence, paging carriers have no data or record upon which to determine the "fair value" of the service provided to the calling party by payphone providers based on some measure of commission payments. Moreover, OSPs, by virtue of their current practices, have exhibited a willingness to pay commissions to payphone providers. Since payment of commissions for payphone-originated calls is not an existing practice in the paging industry, it simply does not make sense to adopt commission payments as a surrogate or benchmark for calls to paging subscribers, even if one assumed, *arguendo*, that any payment was appropriate.